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## In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, ex rel. STATE LANDS COMMISSION  
*Petitioner,*

vs.

UNITED STATES OF AMERICA, et al.,  
*Respondents.*

**BRIEF FOR AMICI CURIAE STATES OF ALASKA,  
ARIZONA, HAWAII, IDAHO, INDIANA, IOWA,  
KANSAS, LOUISIANA, MICHIGAN, MINNESOTA,  
MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA,  
OREGON, PENNSYLVANIA, SOUTH DAKOTA,  
TEXAS, WASHINGTON AND UTAH IN SUPPORT  
OF CALIFORNIA'S PETITION FOR  
A WRIT OF CERTIORARI**

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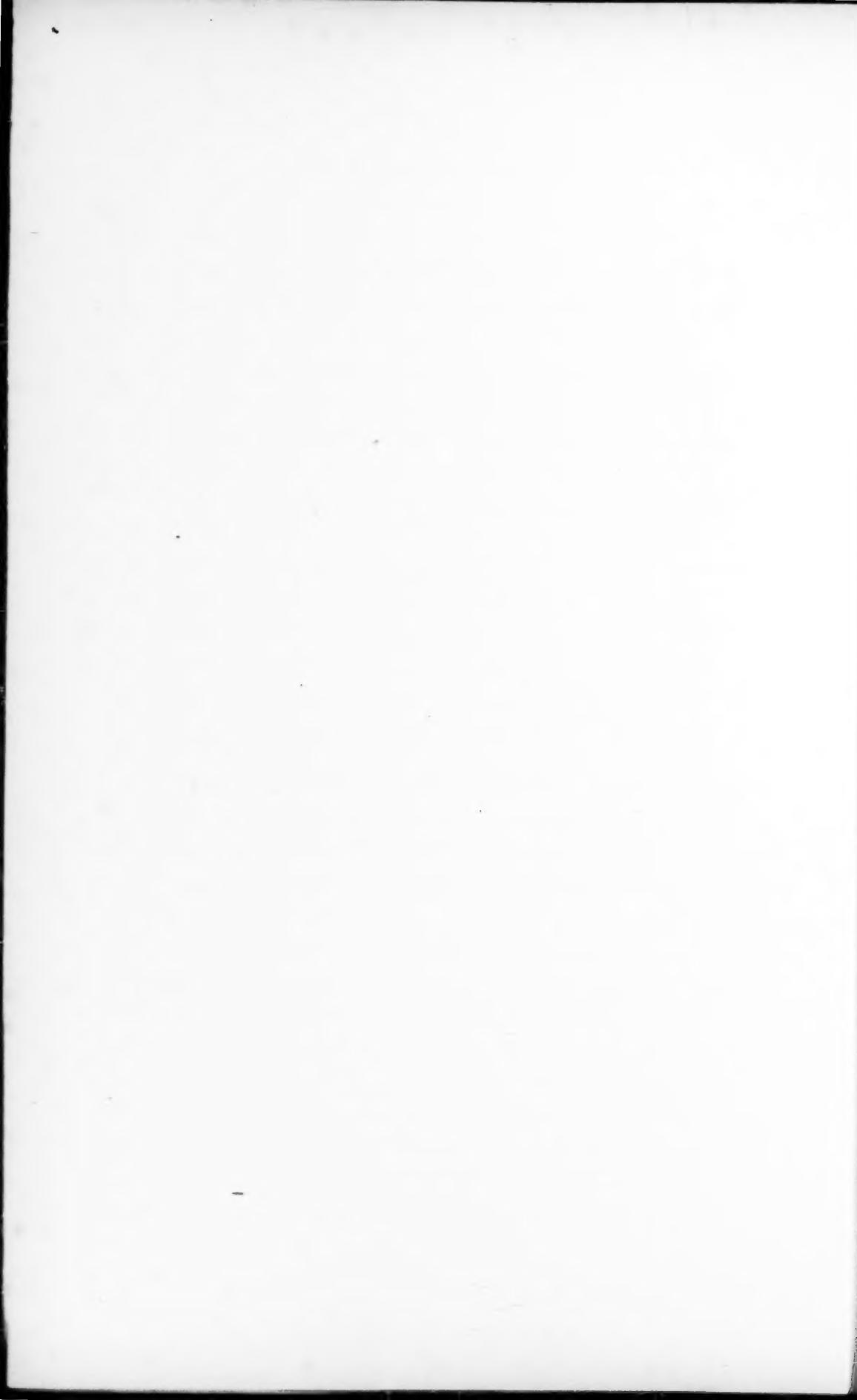
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**INTERESTS OF AMICI CURIAE**

Throughout the history of this country, the Court has acknowledged and reaffirmed the important interests of the States in the ownership and control of their sovereign lands and in the creation and administration of state law, especially real property law. E.g., *Utah Division of State Lands v. United States*, U.S.L.W. 4750 (June 8, 1987); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Barney v. Keokuk*, 94 U.S. 324 (1877). The Court has further recognized that fair and evenhanded state law should govern the ownership interests of the federal government that are adjacent to inland navigable waters. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). In addition, the Court has estab-

lished a general policy against the creation of federal common law. E.g., *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The decision below offends all of these principles.

The Ninth Circuit would require that federal common law determine federal-state boundary disputes whenever the state claim arises from ownership of sovereign lands. The lower court incorrectly takes the Submerged Lands Act as a "mandate" to create federal rules of decision. But, paradoxically, the Act expressly supports the States' ownership, possession and control of sovereign lands. The lower court also erroneously declared that federal common law rules must automatically govern simply because a State *could* enact rules that injure federal interests, even though there is no evidence that States actually have done so.

The long-term implications of the decision below, if left uncorrected, cannot be understated. Federal lands abut inland navigable waters in various States. The determination of whether a lake bed has been uncovered by the process of reliction has always been governed by the property laws of each State, based on each State's geography and its particular needs and policies in maintaining an orderly system of property rights.

Under the decision below, federal common law would control federal claims to "relicited" sovereign lands. The *amici* States do not believe reliction should be governed by federal law at all,<sup>1</sup> and

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<sup>1</sup>As the decision below asserts, the United States' claim in this case depends on the Submerged Lands Act's reference to "accretion." Pet. App. A-5, A-6, citing 43 U.S.C. section 1313(a). But this case involves reliction, which is not mentioned in section 1313(a), and which is different from accretion. There is no statutory basis for making reliction a matter of federal law. The lower court also relied on *California State Lands Comm'n v. United States*, 457 U.S. 273 (1982). But that case involved accretions to *oceanfront* land, which, because it has a "special nature" as the national coastal boundary, necessarily involves federal law. *Id.* at 280, 283, citing *Hughes v. Washington*, 389 U.S. 290 (1967). No statutory nor precedential nor practical reason exists to apply federal law to the instant case.

certainly not by federal common law. But assuming federal law should apply at all, state law should be incorporated as the relevant federal law. The reasons are compelling.

When waters recede on state sovereign lands, all abutting property owners are affected, and lawsuits frequently result. Such disputes may be between private and federal littoral owners *inter se* and also between those parties and the State as the holder of sovereign title. Disputes are minimized so long as applicable law remains settled and predictable, and so long as neighboring landowners enjoy equal treatment under a uniform application of the law. The decision below would upset the prevailing equanimity by applying different law to one landowner, the Government.

The Ninth Circuit's creation of a uniform national property law for federal claims would inevitably confuse established property law wherever the Government owns land abutting navigable waters. The confusion would give rise to disputes that would affect private, state and federal title in many States. And besides the inevitable title disputes, State and local land planners and administrators would be burdened with difficult new questions of how to discern applicable federal common law and when and where to apply it.

The decision below has the potential of disrupting a great many property rights throughout the Nation, and it is imprudent and unnecessary. The least disruptive choice of law is the law of the State in which the property exists. It is far more reasonable that one party (the Government) follow evenhanded state reliction laws than to require each State to change its laws and procedures to accommodate that one property holder. And nothing in this Court's decisions is to the contrary. Unlike the *Hughes* situation of oceanfront property that forms the national boundary, inland sovereign lands are not "sufficiently different . . . so as to justify a 'federal common law' rule of riparian proprietorship." *California State Lands Comm'n, supra*, 457 U.S. at 282, quoting *Oregon State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377 n.6 (1977).

In the instant case, as "[i]n *Wilson*, where [the Court] did adopt state law as the federal rule, no special federal concerns, let

alone a statutory directive, require[s] a federal common-law rule." *California State Lands Comm'n, supra*, 457 U.S. at 284.

The decision below should be reviewed also for other reasons. If, as the Ninth Circuit suggests, federal interests require protection from the application of state law whenever the State is in a position to establish rules that favor state interests — even though the State has not in fact done so —then federal common law will always control because there is always the possibility that state law will "favor" state interests. But this has never been the test. In the absence of "concrete evidence" that state law adversely affects federal interests, state law should ordinarily be borrowed as the rule of decision. *Wilson*, 442 U.S. at 673 (1979); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979). California law in any event is consistent with common law authority, and the possibility that the federal government may not prevail under California law is not itself a sufficient reason to create special federal rules on its behalf. *Wilson*, 442 U.S. at 673.

The amici States request that the Court grant the petition for a writ of certiorari.

### SUMMARY OF ARGUMENT

The Ninth Circuit's decision disturbs vital principles affecting state sovereignty, state-federal relations, and important property rights.

The decision below violates *California State Land Comm'n v. United States*, 457 U.S. 273 (1982), *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-72 (1979), and *Oregon State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), by holding that federal common law governs property rights in sovereign lands uncovered when the water recedes. Those decisions, along with the Submerged Lands Act, require that the decision below be reviewed and corrected.

The lower court decided this case by faulty inference and analogy. *California, supra*, had concluded that "a dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal

law.” 457 U.S. at 283 (emphasis added). But the instant case involves neither accretions nor oceanfront lands.

The decision below departs from this Court’s clear pronouncements: Oceanfront lands are “sufficiently different from the usual situation so as to justify a federal common law rule of riparian proprietorship: . . . This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the supreme Law of the Land.” *Corvallis*, 429 U.S. at 377 n.6 (internal quotation marks omitted), favorably quoted in part in *California, supra*, 457 U.S. at 282.

Indeed, “[a]lthough federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State’s admission to the Union, the State’s title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law.” *Id.*, 429 U.S. at 370-71.

The Submerged Lands Act assures and secures state title in sovereign lands, and section 5(a) expressly excludes *accretions* to federal lands from the Act’s operation. But section 5(a) says nothing of *reliction*; it does not define *reliction*, nor make *reliction* a matter of federal law, nor refer to *reliction* in any way. Furthermore, the legislative history of the Act makes clear that section 5(a) in any circumstances was not intended to direct the use of federal common law in situations where it would not have governed prior to the passage of the Act. The Act does not purport to be relevant to this case, affords no basis for creating federal common law, and does not support the decision below.

Federal common law has no place in this case, and if federal law should apply at all, then only in the form of state property law incorporated as the federal rule of decision. *Wilson, supra*, 442 U.S. at 671-73. There is “no need for a uniform national rule to determine whether changes in [a water body] affecting riparian land owned or possessed by the United States . . . have been avulsive or accretive.” *Id.* at 673. Federal interests, therefore, should “be treated under the same rules of property that apply to

private persons holding property in the same area by virtue of state, rather than federal, law." *Id.*

At risk under the lower court's decision are important interests significant to the States. One of the most prominent and important elements of state sovereignty is ownership of beds of navigable waters, which are held in trust for the public. Apparently, under the Ninth Circuit's expansive view of the reliction doctrine, the States would automatically lose ownership of uncovered sovereign lands. Another extremely important state concern — for legal and practical reasons — is the impact on the States' administration of an orderly system of real property law. Under the decision below, dual sovereigns will administer these sovereign lands; and the local topographic and political necessities underlying state property law are disregarded in favor of a procrustean uniformity. All of that will create confusion and, inevitably, disputes and litigation amongst private, state and federal owners.

The lower court has misused section 5(a) of the Submerged Lands Act to fashion a choice of law that favors federal interests without regard for vital state interests. In so doing, the lower court violated the purpose of the Act and failed to observe the required analysis for choice of law.

Simply, the lower court's decision has no basis in statutory law, it offends this Court's precedents, disregards principles of property law and violates the general rule against creating federal common law. It should be reviewed and reversed.

## ARGUMENT

### I

#### THE NINTH CIRCUIT'S DECISION INTERFERES WITH THE STATES' OWNERSHIP OF SOVEREIGN LAND AND THEIR ADMINISTRATION OF LOCAL REAL PROPERTY LAW.

The Ninth Circuit's adoption of federal common law rules to govern virtually all federal-state property disputes has adverse consequences in two important areas of state interest — state ownership and control of sovereign lands and state administration

of a uniform, evenhanded system of state real property law. Both of these interests are deeply ingrained in the history of this country.

**A. The Interests of the States in the Ownership of Sovereign Lands and in the Administration of State Real Property Law are Well-Established.**

**1. State ownership of sovereign lands.**

One of the most important elements of the States' sovereignty is their title to the beds of navigable waterways, which are held in trust for the benefit of their people. State ownership of these "sovereign" lands derives from principles of the common law of England whereby the Crown held such lands, in trust, by virtue of its sovereign prerogative. *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894); *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 435-437 (1892). When the Revolution took place, the original States succeeded to such title as independent sovereigns, and that title was not granted or otherwise delegated by them to the new national government. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-230 (1845). Later-admitted States succeeded to this same title, not by virtue of any congressional grant, but by virtue of their status as sovereigns equal in stature to the original States under the constitutionally-based Equal Footing Doctrine. *Pollard's Lessee*, 44 U.S. at 223, 228-230; *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370, 373-374 (1977).

This title in the States is an inherent attribute of their sovereignty. *United States v. Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Hardin v. Jordan*, 140 U.S. 371, 381 (1891). "The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged. . . ." *Massachusetts v. New York*, 271 U.S. 65, 89 (1926). Accordingly, this Court has ruled that a State's title to such land vests absolutely upon statehood and is

not subject to later defeasance by operation of federal law. *Corvallis*, 429 U.S. at 370-371, 374, 386.

## 2. State administration of real property law.

The States' interest in administering and applying its real property law is another important element of their sovereignty. In a line of cases extending from *Pollard's Lessee* through *Wilson*, this Court has held that determinations concerning land title are matters for the application of state law. See, e.g., *Barney*, 94 U.S. at 337; *Packer v. Bird*, 137 U.S. 661, 669-670 (1891); *St. Louis v. Rutz*, 138 U.S. 226, 242 (1891); *Shively*, 152 U.S. at 57-58. "The nature and extent of the rights of the state and of riparian owners in navigable waters within the state and the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state." *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651, 655 (1927).

This interest is particularly acute as it relates to state administration of sovereign lands. The Court long ago held that ". . . it depends on the law of each State as to what waters and what extent this prerogative of the State over the lands under water shall be exercised." *Hardin*, 140 U.S. at 382. Consequently, state law has long controlled questions regarding the characterization of physical changes to its sovereign lands. When a physical change occurs solely within the boundary of a single State, this Court has applied the following general rule:

"How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them." *Arkansas v. Tennessee*, 246 U.S. 158, 175-76 (1918); see *Rutz*, 138 U.S. at 242.

## **B. The Ninth Circuit's Decision has Serious Adverse Consequences for these Interests.**

Based on its reading of the Submerged Lands Act, the Ninth Circuit devised a rule which requires that federal courts develop federal common law rules to control federal-state property disputes whenever the States' ownership is based on sovereign ownership of navigable waters and their beds. It further announced that a federal common law rule of decision must be adopted merely because the States conceivably could adopt rules that benefit themselves at the expense of federal upland interests. The Ninth Circuit's opinion has serious adverse consequences for the States.

### **1. Impacts on sovereign land title.**

First, the Ninth Circuit decision results in the direct and immediate loss of state sovereign lands because the federal common law created by the Ninth Circuit systematically favors upland interests to the detriment of the owner of the bed. Under the Ninth Circuit's version of federal common law, all physical changes to lakes will be characterized as "relictions" regardless of the factual circumstances, and all such "relictions" will redound to the federal government as upland owner. This automatic rule of reliction has no support under general common law principles. (See California Petition for a Writ of Certiorari ("Cal. Petition") at 20-22.

The States' interest in retaining their sovereign lands is more than a proprietary one. Sovereign lands are

"... different in character from that which the State hold in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . ." *Illinois Central Railroad*, 146 U.S. at 452.

The subject of the present litigation demonstrates the important difference between sovereign lands and other publicly-owned

lands. In *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709, *cert. denied*, 464 U.S. 977 (1983), the California Supreme Court held that the future of the bed and waters of Mono Lake must be guided by the public trust principles announced in *Illinois Central Railroad*. By declaring that the uncovered bed adjoining federal upland ownership belongs to the United States, however, the Ninth Circuit terminated the public trust character of most of the uncovered bed of Mono Lake. This portion of uncovered bed is therefore no longer subject to the inherent limitations on use and alienation imposed by the public trust doctrine. *Illinois Central Railroad*, 146 U.S. 387. Instead, the federally-owned portion of uncovered bed is now generic federal public land, subject to the caprice of a particular federal administration.

## 2. Impact on state administration of real property law.

Second, the Ninth Circuit's requirement that these disputes be governed by federal common law rules also has grave consequences for the States' interest in developing and administering local real property and land title law. The Ninth Circuit's insistence that federal common law rules automatically govern federal-state disputes involving state sovereign lands offends the States' legitimate interest in their status as autonomous sovereign entities and results in unnecessary federal intrusion into areas of state concern. This invasion of state sovereign interests has real-life consequences.

Under the Ninth Circuit's approach, in a single dispute involving newly-created land along inland navigable waterways, federal upland interests competing against state sovereign interests will be governed by federal common law rules; federal upland interests competing against private and state upland interests will be governed by federal law borrowing state law; and, under *Corvallis*, private upland interests competing against state sovereign interests will be governed by state law. This confusing and arbitrary scheme imposes different rules and potentially different outcomes, even though the identical physical process (the uncovering of sovereign land) is involved in all three disputes. That would subvert the States' interest in a fair and orderly system of real

property law. *Wilson*, 442 U.S. at 673. Furthermore, it contradicts the lesson in *Wilson* that “we see little reason why federal interests should not be treated under the same rules of property that apply to persons holding property in the area of virtue of state, rather than federal, law.” *Id.*

The practical dysfunction of the lower court’s approach is further illuminated by the record in this case. Under the Ninth Circuit’s opinion, the federal upland ownership surrounding Mono Lake will belong to the United States under a federal common law of reliction; the remaining portion of the uncovered bed which is adjacent to the private and non-federal public upland parcels that are scattered among the federal parcels will belong to California under California law. The result is a mosaic of federal and state-owned parcels mixed throughout the uncovered lake bed, without clearly delineated lateral boundaries between state and federal ownership. Rather than the orderly administration of the uncovered bed by one sovereign (California), the Ninth Circuit’s opinion requires dual administration by two sovereigns, often with uncertainty as to the boundaries between state and federal lands.

The Ninth Circuit’s decision has other practical impacts on the administration of local property law. Purchasers and sellers of real property make rational judgments concerning the nature and extent of land title conveyed and delivered based on their assumptions about state property rules. The introduction of federal common law rules may jeopardize these relationships formed in reliance on state law. The record in this case is again instructive. California has issued over 400 patents to over 136,000 acres of land throughout the state in reliance on its ownership of drained lake beds under California law. CR 91 at 46-47, ¶ 106. Wherever the federal government is an upland owner, application of a federal rule of “reliction” now clouds the title of the private purchasers of former lake bed parcels throughout the state who reasonably acted in reliance on state law.

The Ninth Circuit’s application of a nationwide uniform federal rule also frustrates the ability of the States to operate an integrated, consistent local scheme of land title based on the pertinent geographical, geological, legal, or political considerations applica-

ble in each state. The Ninth Circuit's extrapolation of the common law reliction doctrine to the facts of this case illustrates the problem. Based on the extremely limited federal decisional law addressing additions to navigable lakes, see *Banks v. Ogden*, 69 U.S. 57 (1865), the Ninth Circuit concluded without analysis that all such additions must be characterized as "reliction." In fact, there is no one answer to the questions concerning the characterization and ownership of uncovered lake beds. State courts have addressed lake uncoverings in a variety of ways, taking into account the size and rate of the uncovering, whether the bed was intentionally drained, reclaimed or uncovered, and whether policy considerations supporting the reliction doctrine were present. See Cal. Petition at 20-22. Natural physical conditions themselves significantly vary from region to region: a truly natural, gradual and imperceptible recession of a navigable lake might lead a court in the midwest to characterize the newly-exposed land as "reliction"; courts in the western United States, addressing ownership issues associated with continually fluctuating lakes with no outlet — lakes that have no factual counterpart in the history of common law — would be justified in finding no reliction or change in ownership even where a substantial area of land was exposed. See *Utah v. Hardy Salt Co.*, 486 P.2d 391 (Utah 1971).

This Court has implicitly recognized the need for flexibility in creating ownership rules. The Court adopted the Special Master's Report in *Utah v. United States*, 420 U.S. 304 (1975), 427 U.S. 461 (1976), in which the Special Master did not apply the reliction doctrine and did not follow the concept of ordinary highwater mark in the Great Salt Lake case. California and the rest of the states should be free to develop rules to address the conditions peculiar to their jurisdictions and to apply these rules to the federal government as long as they do so in a fair and evenhanded manner.

A consideration of these impacts on state interests is an important factor in the choice of law equation, see *Wilson*, 442 U.S. at 674-75, but the Ninth Circuit did not even suggest that it had taken state interests into account in its choice of law analysis. Moreover, the Submerged Lands Act, on which the Ninth Circuit

based its decision to apply federal common law, demonstrates no intent to disregard or minimize State interests.

## II

### THE NINTH CIRCUIT'S CHOICE OF LAW CONFLICTS WITH THE PURPOSE OF THE SUBMERGED LANDS ACT TO PROMOTE STATE OWNERSHIP AND CONTROL OF SOVEREIGN LANDS.

Since the federal *upland* property involved in this case was included in section 5(a) of the Submerged Lands Act, 43 U.S.C. section 1313(a), the Ninth Circuit concluded that the Act requires the use of federal rules of decision to govern ownership of the exposed bed. In an attempt to reconcile its incorporation of federal common law with the holding in *Wilson*, the Ninth Circuit determined that section 5(a) requires federal common law rules only in cases where the States' claim is based on its ownership of sovereign lands, but not where the States' claim is based on riparian ownership. This analysis disregards the purposes and intent of the Submerged Lands Act.

#### A. The Purpose of the Submerged Lands Act.

The Submerged Lands Act may be the most affirmative promotion of state interests that Congress has enacted in the past 35 years.

It is well known that the Submerged Lands Act was enacted by Congress as a response to a series of cases in which the Court determined that the federal government had "paramount rights" to the lands and resources within the three-mile limit extending from the coastal shoreline.<sup>2</sup> Congress believed that these submerged coastal lands belonged to the States just as tidewaters and navigable inland waters do. E.g., S. Rep. 1592, 80th Cong., 2d Sess. 5, 17, 18, 26 (1948); S. Rep. No. 133, 83d Cong., 1st Sess. 7, 24 (1953). The Act thus restored to the States the possession

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<sup>2</sup>See *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

and control of these submerged coastal lands. E.g., S. Rep. No. 133 at 24; 99 Cong. Rec. 2830 (1953). The Court has agreed that the Act was designed to undo the effect of its 1947 decisions. See *United States v. California*, 436 U.S. 32, 37 (1978); *United States v. Louisiana*, 363 U.S. 1, 35-36 (1960).

In order to underscore the States' control of navigable waters, the Act went beyond the problem that generated the legislation and also confirmed the States' ownership of tidelands and land underlying inland navigable waters. 43 U.S.C. sections 1301, 1311. Both the supporters and the opponents of the Act agreed that the confirmation of these lands reaffirmed the States' historic ownership of these lands under the Equal Footing Doctrine. E.g., H.R. Rep. No. 1778, 80th Cong., 2d Sess. (1948), reprinted in 1953 U.S. Code Cong. & Ad. News 1425; S. Rep. No. 133, 83d Cong., 1st Sess. (1953), reprinted in 1953 U.S. Code Cong. & Admin. News 1480; Minority views to accompany H.R. 5992, reprinted in 1953 U.S. Code Cong. & Ad. News 1439; Minority views to S.J. 13, reprinted in 1953 U.S. Code Cong. & Ad. News 1543, 1553. This ringing confirmation encompassed not just state ownership of sovereign lands, but administration and control of the lands under applicable state laws. E.g., H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), reprinted in 1953 U.S. Code Cong. & Admin. News at 1388-89.

**B. Section 5(a) was Designed to Maintain the Status Quo with Respect to Federal Property, and Does Not Require the Use of Federal Rules to Resolve Property Disputes Where State Law Would Have Controlled Prior to the Act.**

Given this resounding declaration of the States' ownership and control of their sovereign lands, it would be anomalous if Congress at the same time intended that section 5(a) would have the effect of requiring the development of federal common law principles in situations where state law would have controlled prior to the passage of the Act, at least where inland navigable waters are involved. It is not surprising that there is no legislative history suggesting that Congress intended section 5(a) to have that effect. To the contrary, the legislative history regarding the meaning of 5(a) is unequivocal that its purpose was to leave the

United States in the position it occupied at the time of the passage of the Act. Thus, this colloquy regarding section 5(a):

*Sen. Holland.* ". . . I should like to inquire if it was the purpose of this particular exception to leave the Federal Government exactly in the position it now occupies, with such rights as it may have, and with such obligations or responsibilities as it may have, with reference to any lands which it presently and actually occupies by reason of building and maintaining on such lands, installation and the like, under claim of right. There was no purpose to improve the rights of the United States, or to take from those rights in any particular, by this provisions?"

*Sen. Cordon.* "The Senator is exactly correct."

*Sen. Holland* ". . . I now wish to return to the earlier provision or exception, which relates to "All lands expressly retained by or ceded to the United States when the State entered the Union. . . ."

*Sen. Cordon.* ". . . The provision specifically saves to the United States that type of facility concerning which there never has been, in the history of this country, a question as to the Federal Government's rights of ownership.

"The sole purpose of the legislation proposed is to recreate the situation in law as it existed in fact before the California, Louisiana, and Texas decisions and not to go beyond that point."

99 Cong. Rec. 2619 (1953).

Senator Cordon later reemphasized the point:

"The purpose of the language [in section 5(a)] is to retain in the Government, such rights as the Government, under its claim of right in the lands, is actually occupying, *thus putting the Government, after the enactment of the pending measure, in the position it would have occupied had none of these matters ever arisen, and if it had to stand on whatever law supported its claim.*" *Id.* at 2631 (emphasis added); see *United States v. California*, 436 U.S. at 38, 39 (citing to

legislative history that section 5(a) “neither validates the claim nor prejudices it, but merely ‘leaves it where we found it’ for eventual adjudication”).

Section 5(a) does not direct the adoption of federal common law rules at all. The Act’s purpose is to ensure State title, and section 5(a) neither enhances federal claims to “reliected” lands nor detracts from State title in those lands. Simply, section 5(a) does not apply in this case and does not support the adoption of federal common law rules adverse to state property law. Even if that section did apply, it would support a federal common law reliction rule only if federal common law would have governed prior to passage of the Act.

This interpretation of section 5(a) is wholly consistent with the general purpose of the Act, which was to restore state sovereign ownership as it was believed to exist prior to *United States v. California*, 332 U.S. 19 (1947), and incidentally to confirm state sovereign ownership in inland areas that had not been affected by the Act. See text *supra* at 14-15; 99 Cong. Rec. 2618-19, 2680 (1953). With respect to inland waters, the Ninth Circuit’s conclusion would put the States in a worse position than they were in before the Act, a result plainly contrary to the intent of Congress.

The language of section 5(a) also contradicts the idea that section 5(a) directs the adoption of federal common law. Section 5(a) is extremely broad and involves far more than just a retention of accretions to federal lands. It includes:

(1) all land title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States;

(2) all lands which the United States lawfully holds under the law of the State;

(3) all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea);

(4) all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity;

(5) all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and

(6) any rights the United States has in lands presently and actually occupied by the United States under a claim of right. 43 U.S.C. section 1313(a).

Section 5(a) is merely an inventory of federal property that is unaffected by the Act. It does not dictate the adoption of federal rules to decide disputes involving federal property. To the contrary, it expressly recognizes that some federal property is held under state law; surely Congress did not intend to direct the development of federal common law rules to resolve property disputes where the United States' claim is derived solely from state law. Again, the only reasonable interpretation of section 5(a) is that it was designed to maintain federal ownership (other than the "grant" of submerged coastal lands) *as it existed under the law prevailing at the time of the Act*. Federal common law principles should resolve property disputes only if they would have done so prior to the Act.

Finally, the Ninth Circuit's conclusion that section 5(a) directs adoption of federal common law in cases involving state sovereign claims, but not state or private upland claims, makes no sense as a matter of policy. Why would Congress declare that the federal interests in the use of a federal common law rule are greater when the United States opposes the state in a sovereign rather than a proprietary capacity? Although the federal interest in choice of law is no different in the two cases, the States' interest in the application of state law is significantly greater when their sovereign lands are involved. Contrary to the purposes of the Submerged Lands Act and the policy concerns in *Wilson*, which favor the borrowing of state law, the Ninth Circuit has ascribed to Congress an intent to discriminate between state sovereign and proprietary claims and to effectively penalize the States whenever their claims are based on sovereign title. Nothing in the Submerged Lands Act supports such a result.

To summarize, the Ninth Circuit's use of federal common law in this case conflicts with *Wilson* and the Submerged Lands Act because (1) California's claim depends on the Equal Footing Doctrine, not the Act, so the Act is immaterial here, Cal. Petition at 11-19; (2) section 5(a) of the Act does not purport to apply to "reliction" lands; (3) even if section 5(a) were relevant, it would provide for federal ownership of lands only to the extent federal law gave the Government title before passage of the Act, and it does not direct adoption of federal common law; and (4) the Ninth Circuit's attempt to reconcile *Wilson* on the ground that the Act directs adoption of federal common law where the States' claim is based on sovereign ownership directly contradicts the Act's undisputed purpose of securing State title in sovereign lands.

Under the Ninth Circuit's approach, States' ownership and control of their sovereign lands underlying inland navigable waters have been seriously diminished, rather than enhanced, by the Submerged Lands Act. It is safe to assume that not a single member of Congress in 1953 intended the construction of the Act put forth by the Ninth Circuit.

## CONCLUSION

The amici States request that the Court grant the petition for a writ of certiorari.

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Respectfully submitted,

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